UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ANDREW CAINION, Plaintiff, v. CITY OF BAINBRIDGE ISLAND, STEVE BONKOWSKI, KATHARINE COOK, Defendants.	CASE NO. C13-5768 RJB ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the court on Defendants' Motion for Summary Judgment. Dkt. 16. The court has considered the relevant documents and the remainder of the file herein.

PROCEDURAL HISTORY

On August 30, 2013, plaintiff filed a complaint against the City of Bainbridge Island; Steve Bonkowski, Mayor of the City of Bainbridge Island; and Katharine Cook, Director of the City of Bainbridge Island Department of Planning and Community Development. Dkt. 1. The complaint alleges that defendants discriminated against plaintiff based upon his race, in violation of 42 U.S.C. § 1983.

Plaintiff was initially represented by counsel, who withdrew on December 4, 2013. Since that time, plaintiff has been proceeding *pro se*.

RELEVANT FACTS

Plaintiff's Purchase of Property and Re-Zone. In 1989, plaintiff purchased a parcel of property about a half-mile from Fletcher Bay, on the western side of Bainbridge Island. When plaintiff purchased the property in 1989, the City of Bainbridge Island had not yet incorporated; the property was within Kitsap County jurisdiction. The Fletcher Bay property was zoned residential at the time plaintiff bought it.

In the late 1980s, plaintiff sought a Planned Unit Development (PUD) and re-zone to commercial. Kitsap County granted the request and rezoned the property to commercial. Plaintiff, in turn, agreed to complete the development within three years. Around this time, contaminants were discovered in the soil nearby, leading to litigation with the Department of Ecology and protracted bankruptcy proceedings. Plaintiff did not develop the Fletcher Bay property within three years.

In the interim, the City of Bainbridge Island incorporated and assumed jurisdiction in 1991. Noting that Kitsap County's PUD regarding the Fletcher Bay property had lapsed, the City of Bainbridge Island began the process to revoke the re-zone. A hearing was held in April of 1996 before a hearing examiner. Plaintiff was represented by counsel. The hearing examiner revoked the PUD and re-zone. Plaintiff did not appeal further or seek judicial review. Plaintiff's property reverted to Open Space/Residential zoning.

Comprehensive Plan and Neighborhood Service Zone. The Land Use Element of the City of Bainbridge Island's Comprehensive Plan provides that Neighborhood Service Centers (NSCs) "serve as small-scale commercial activity centers, which supplement that of the city center, but remain at only a "slightly higher density to reinforce their role as small-scale, community centers." Dkt. 19, at 16-19. NSCs are regulated "to provide a mix of neighborhood-scale residential, commercial, and

service activity that is compatible with the scale, character, and intensity of the surrounding residential neighborhood and that minimizes impacts…" BIMC 18.06.050(A). The City of Bainbridge Island has three NSCs: Island Center, Lynwood Center and Rolling Bay. Plaintiff's residentially-zoned property is just outside the Island Center NSC zone. Plaintiff has been working to incorporate his property into the Island Center NSC zone, which would permit commercial development. Pursuant to the City of Bainbridge's Comprehensive Plan, changes to the boundaries of an NSC must go through a special planning process. *See* Dkt. 19, at 14-20. According to the declaration of Katharine Cook, Director of Planning and Community Development for the City of Bainbridge Island, this process is unique and recognizes the special characteristics of the area; and the process allows for collaboration, and even mediation, between the stakeholders (which include the public, city staff, planning commission, and elected officials). Dkt. 19, at 3. A special planning process may be requested, in writing, by at least one owner of property located within a special planning area. *See* Dkt. 19.

Special Planning Area Process in 2002. In approximately 2002, a special planning area process was commenced for Island Center. According to Ms. Cook, during that process, much of the surrounding neighborhood was strongly opposed to any expansion of the NSC, and individuals at the meeting were extremely hostile. Dkt. 19, at 3-4. The process was therefore discontinued. *Id.* Ms. Cook stated in her declaration that '[r]ace played no role in this whatsoever. The non-expansion of the Island Center NSC affected the rights of minorities and non-minorities alike." Dkt. 19, at 4. Plaintiff testified in his deposition that, since then, he has made no written requests for another special planning area process, although he stated that he "talked to [Ms. Cook] about it a couple times." Dkt. 17, at 27.

2007 and 2010 Re-zone Efforts. In 2007, plaintiff submitted a proposal to the city council to amend the Comprehensive Plan to change the boundaries of the Island Center NSC to include his

property. Dkt. 19, at 4. The City Council denied his request. Plaintiff did not appeal to the Washington Growth Management Board or Superior Court.

Plaintiff petitioned the City Council again in 2010, seeking effectively the same thing as he had in 2007. Plaintiff testified in his deposition that three individuals opposed the request but no one supported the application. Dkt. 17, at 26. The city planning commission supported the application; the city staff did not support the application. On August 25, 2010, the Bainbridge Island City Council denied the request. The City Council resolution stated as follows:

> The primary basis for the denial of CPA 14567 by the City Council is that the application does not comply with decision criteria established by BIMC 18.117.050(C)(2), requiring consistency with the overall intent of the Comprehensive Plan. Specifically, CPA14567 does not comply with Land Use Policy NSC 1.3 and LU 1.9, which requires boundaries to the Neighborhood Service Center be determined by a Special Planning Area Process to allow for comprehensive, neighborhood consideration of the land use change, which has not occurred in this case.

See Dkt. 19, at 23-24.

Plaintiff has not had any further interactions with the City of Bainbridge Island or with the staff.

Plaintiff appealed the August 25, 2010 Bainbridge Island City Council decision to the Washington Growth Management Board, RCW 36.70A RCW, which affirmed the City's decision. Dkt. 19, at 4. Plaintiff did not seek judicial review of the decision of the Growth Management Board.

The complaint alleges that, in 2013, a non-minority Rolling Bay resident applied for a rezone from residential to commercial through an amendment to the Comprehensive Plan rather than the special planning area process. Dkt. 1, at 8. The complaint alleges that City staff recommended approval of the expansion of the commercially zoned area of the Rolling Bay NSC, and recommended the same expansion for the Island Center NSC. The complaint alleges that, at a special meeting on June 27, 2013, the Planning Commission removed the Island Center NSC from

the proposal; and recommended that staff look into how to allow the Rolling Bay proposal without changing the special planning area process. Dkt. 1, at 8-9.

MOTION FOR SUMMARY JUDGMENT

In their motion for summary judgment, defendants contend that (1) the lawsuit is time-barred; (2) service has not been properly effectuated upon any of the defendants, and the defect cannot be cured in light of the statute of limitations; (3) Steve Bonkowski and Katharine Cook are entitled to qualified immunity; and (4) the legislative decisions made by the City Council involve application of existing law, without regard to race. Dkt. 16.

On May 7, 2014, the court notified plaintiff of the requirements to respond to the motion for summary judgment. Dkt. 21. Plaintiff did not respond to the motion. The court has carefully considered the record in this case and has construed the facts in favor of plaintiff.

LEGAL STANDARD

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect. Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hope that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra).* Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

In support of the motion for summary judgment, defendants may raise an issue, based upon the pleadings, and the burden shifts to plaintiff to make a sufficient showing on all essential elements of his claim, on which he has the burden of proof. *See Celotex Corp. v. Catrett*, 477 U.S. at 323-325 (burden of moving party in summary judgment motion may be met by pointing out to the district court that there is an absence of evidence to support the nonmoving party's case; once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify facts which show a genuine issue for trial).

The nonmoving party must establish specific facts demonstrating the existence of each element essential to that party's case in order to create a genuine issue for trial. *Kendall*

v. Public Hospital District, 118 Wn.2d 1, 8-9 (1991). In so doing, the nonmoving party must rely exclusively on admissible evidence to establish such specific facts in opposition to the moving party's motion. *Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir. 2002).

DISCUSSION

1. Statute of Limitations

Limitation periods in cases brought under 42 U.S.C.§1983 are determined by reference to the applicable state's statute of limitations and the coordinate tolling rules. *Rose v. Rinaldi*, 654 F.2d 546 (9th Cir. 1981); *Bianchi v. Bellingham Police Department*, 909 F.2d 1316 (1990). RCW 4.16.080(2) provides a three year statute of limitations for personal injury to the person or rights of another. *See Antonius v. King Cnty*., 153 Wn.2d 256, 261-62 (2004)("Discrimination claims must be brought within three years under the general three-year statute of limitations for personal injury actions….").

Federal law determines when a civil rights claim accrues. *Olsen v. Idaho State Bd. of Med*., 363 F.3d 916, 926 (9th Cir. 2004) (quoting *Morales v. City of Los A*ngeles, 214 F.3d 1151, 1153–54 (9th Cir. 2000)). A discrimination claim accrues when "the plaintiff knows or has reason to know of the actual injury," irrespective of knowledge of "discrimination or discriminatory motive." *Lukovsky v. City & Cnty. of San Francisco*, 535 F.3d 1044, 1051 (9th Cir. 2008) (collecting cases); *see also Thelen v. Marc's Big Boy Corp.*, 64 F.3d 264, 267 (7th Cir.1995) (claim accrued upon termination, even though plaintiff did not discover he was replaced by younger employee until later; action accrues upon discovery of injury, not "unlawfulness").

A state's equitable exceptions to a statute of limitations are applicable to the extent they are consistent with federal law. *Board of Regents v. Tomanio*, 466 U.S. 478, 485-86 (1980). Equitable tolling in Washington requires either bad faith, deception or false assurances of the

defendants, and the exercise of diligence by the plaintiff. *Finkelstein v. Security Properties*, 76 Wn.App. 733 (1995), *citing Doucette v. Bethel Sch. Dist. No. 4*03, 117 Wn.2d 805 (1991).

The last interaction plaintiff had with the City of Bainbridge Island or its staff was August 25, 2010, when his request to amend the Comprehensive Plan to change the boundaries of the Island Center NSC to include his property was denied. The claims accrued at least by that date. Plaintiff did not file suit until August 30, 2014, more than three years after the claims accrued. The claims are therefore barred unless plaintiff can establish a basis for equitable tolling of the statute of limitations.

The 2013 Planning Commission recommendations regarding the non minority Rolling Bay applicant's request does not provide a basis for equitable tolling. Construed very liberally, plaintiff might claim that the Planning Commission's decision to delete Island Center from the Rolling Bay applicant's request was based on racial discrimination, and that he became aware of the racial discrimination at that time. The record shows that, in 2010, the Planning Commission *supported* plaintiff's request for an amendment to the Comprehensive Plan; the City Council disagreed and denied plaintiff's request. In 2013, the Rolling Bay applicant requested an expansion of the Rolling Bay NSC; the Planning Commission decided against the staff's recommendation to include Island Center in the request, and instructed staff to make a recommendation on how to allow the Rolling Bay proposal without changing the special planning area process. Plaintiff has come forward with no evidence that the Planning Commission's decision to limit consideration to the Rolling Bay applicant's request, and then to direct staff to pursue avenues of relief for the Rolling Bay proposal, was based on racial discrimination. The Planning Commission was not successful in 2010 in recommending expansion of the Island Center NSC, in favor of plaintiff; in 2013, the Planning Commission was apparently trying to find a way to approve an expansion of the NSC, this time for Rolling Bay. The facts, even as alleged in the complaint, do not provide a basis for equitable tolling

on the basis that plaintiff only discovered the alleged racial motivation in 2013. Plaintiff has set forth no facts that would support a claim for equitable tolling of the statute of limitations. This case is barred by the statute of limitations.

2. Service of Process

Defendants contend that service has not been properly effectuated upon any of the defendants, and that the defect cannot be cured in light of the statute of limitations. Dkt. 16, at 15.

Plaintiff has not filed a certificate of service, pursuant to Fed.R.Civ.P. 4(l), showing that defendants have been served in accord with Fed.R.Civ.P. 4(m), which provides as follows:

> If a defendant is not served within 120 days after the complaint is filed, the court–on motion or on its own after notice to the plaintiff–must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

More than 120 have passed since this case was filed on August 30, 2014. Plaintiff has not shown good cause for failure to effectuate service within 120 days. Further, this complaint is barred by the statue of limitations. On the basis of lack of service alone, the court should dismiss the case. However, in light of the statute of limitations issue, as discussed above, the dismissal should be with prejudice.

3. Qualified Immunity, Legislative Action and Motion to Strike

Defendants contend that Mr. Bonkowski and Ms. Cook are entitled to qualified immunity; that the land use decisions constitute legislative action that involves application of existing law without regard to race; and that certain inadmissible evidence should be stricken. Because this case should be dismissed as untimely, the court need not address these issues.

Accordingly, it is hereby **ORDERED** that Defendants' Motion for Summary Judgment (Dkt. 16) is **GRANTED**. This case is **DISMISSED WITH PREJUDICE**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 27th day of May, 2014.

ROBERT J. BRYAN
United States District Judge